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IBLA 74-326, 74-340 Decided May 5, 1975

Appeals from Alaska State Office, Bureau of Land Management, decision rejecting Alaska Native allotment applications AA 7103, 7382, and 7367.

Set aside and remanded.

1. Alaska: Grazing -- Alaska: Native Allotments -- Regulations: Generally

A grazing lease issued in 1933 for reindeer under the Act of March 4, 1927, became subject to the Reindeer Act of September 1, 1937, and rules and regulations thereunder. Interpretations of the effect of grazing rights granted under the 1937 Act upon a native allotment applicant's claim of occupancy may be applied to such a lease, if they are not to the detriment of the lessee.

2. Administrative Practice: Generally -- Alaska: Grazing -- Alaska: Native Allotments -- Regulations: Generally

A regulation pertaining to grazing permits under the Reindeer Grazing Act of 1937 allows settlement rights to be initiated while a permit issued under that Act is in existence. The policy manifest in that regulation may be followed, in the exercise of the Secretary's discretion, to permit consideration of a native allotment applicant's occupancy of land after the 1937 Act, even though the land was covered by a reindeer grazing lease issued prior to that time under the Act

of March 4, 1927, and the regulation was promulgated after initiation of the occupancy.

Helena M. Schweite, 14 IBLA 305 (1974); Harold J. Naughton, 3 IBLA 237, 78 I.D. 300 (1971), distinguished.

APPEARANCES: Michael J. Frank and James Grandjean, Esqs., of Alaska Legal Services Corporation, for appellants.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

This is an appeal from a decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting appellants' Native allotment applications filed pursuant to the Alaska Native Allotment Act of May 17, 1906, 34 Stat. 197, as amended, 43 U.S.C. §§ 270-1 - 270-3 (1970), (repealed by section 18 of the Alaska Native Claims Settlement Act, 85 Stat. 710, 43 U.S.C. § 1617 (Supp. III, 1973), because the lands were closed to appropriation when use and occupancy commenced and have not been open since that time. The decision recited that the "lands had been segregated from settlement since July 12, 1933, when grazing lease A-07356 was issued to the Alitak Reindeer Company under the Grazing Act of March 4, 1927."

The decision also recited that the lands were withdrawn by Public Land Order 1634 on May 9, 1958, which closed to all forms of appropriation under the public land laws the one-mile-wide shore line strip left open by Executive Order 8857 and revoked that Order in establishing a new wildlife refuge. The decision also mentioned additional subsequent withdrawals.

Appellants contend that the decision below errs in many respects. In view of our disposition of these cases, it is unnecessary to discuss many of these contentions.

The three appellants each allege they began their occupancy of the land in the 1940's, and continued occupying the land thereafter. They contend the grazing lease to an association of natives for reindeer grazing did not appropriate or segregate the land at the time they initiated their occupancy or when the lease was renewed. Therefore, each appellant asserts he had completed five years of occupancy prior to the 1958 withdrawal.

BLM, in rejecting the applications, relied on regulation 43 CFR 4131.3-1, which provides that lands leased under the Act of March 4, 1927, 44 Stat. 1452, 43 U.S.C. § 316 (1970), are not subject to settlement, location, and acquisition under the nonmineral public

land laws applicable to Alaska unless and until the authorized officer of BLM determines that the grazing lease should be canceled or reduced. It also cited the two Board decisions pertaining to native allotment applications to the same effect, namely, Helena M. Schweite, 14 IBLA 305 (1974), and Harold J. Naughton, 3 IBLA 237, 78 I.D. 300 (1971).

> The grazing lease issued in 1933 for 20 years to the Alitak Reindeer Company, a Native association, for the grazing of reindeer. Among other matters the lease provided:
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> 3. The lessor expressly reserves:
>
> (a) The right to permit location and entry under any public land law of the lands embraced in this lease, * * *.
>
> 4. It is further understood and agreed:
>
> * * * * * * *
>
> (d) That this lease is granted subject to valid existing rights and to all rules and regulations which the Secretary of the Interior may prescribe.
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> * * * * * * * * * *
>
> (j) That the lessee agrees to permit legal hunting and trapping by the public within the leased area.

Appellants contend that since the passage of the Reindeer Grazing Act of September 1, 1937, 50 Stat. 900, formerly set forth at 48 U.S.C. § 250 (1960 ed.), the 1927 Grazing Act and regulations and rulings thereunder do not apply to this lease. The 1937 Act provided generally that reindeer grazing was to be exclusively by the natives in Alaska and for their benefit. By a regulation promulgated May 26, 1938, Par. 1, Circ. 1138a, 43 CFR 63.26 (1939 ed.), the Department stated:

> In view of the provisions of section 14 of the Act of September 1, 1937, no reindeer leases will issue under the Act of March 4, 1927, after May 26, 1938, and the grazing of reindeer in Alaska will be governed by the Act of September 1, 1937, and the rules and regulations that may be promulgated thereunder.

This and a preceding regulation setting forth the authority under the 1937 Act were the only regulations issued thereunder until the

issuance of Circular 2074, 26 F.R. 12696, December 29, 1961, 43 CFR 63.31 to 63.51 (1962 Supp.). Regulation 43 CFR 63.49 (1962 Supp.) provided:

> (a) Lands included in grazing permits under the [1937] Act are subject to settlement, location, and acquisition under the non-mineral public land laws applicable the State of Alaska.
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> (b) Upon settlement, location or entry of any lands included within a reindeer grazing permit, the permittee shall be notified of the settlement, location or entry, and the permitted area shall be reduced by the area involved in the settlement, location or entry.

The above-quoted regulations are now set forth at 43 CFR 4132.1-5(a) and (b), without change.

The regulations governing the effect of grazing leases issued under the 1927 Act preclude the initiation of any settlement rights until the grazing lease is canceled. They provide that the lease segregates the land until that time. The quoted regulations pertaining to the Reindeer Grazing Act of 1937, however, do not preclude the initiation of settlement rights while the permit is in effect. Though the regulations contemplate that a permittee will be given notice of a settlement and the permit area reduced, they do not require that the settler take affirmative action or that the permit be reduced before any settlement rights can be recognized. We have then two differing regulatory implementations of statutes which are somewhat similar. Clearly because of the Act of September 1, 1937, and the regulation promulgated on May 26, 1938, any renewal of the lease for reindeer purposes had to be governed by the 1937 Act and any regulations issued thereunder. The lease was renewed for a 10-year period under the Act of 1937, from July 12, 1953.

The particular regulations referred to or quoted above pertaining to both Acts were promulgated after the expiration of the 20-year term of the grazing lease to the Alitak Reindeer Company. Prior to the promulgation of the regulation providing that lands within grazing leases under the 1927 Act segregate the land from non-mineral entry and settlement, an Opinion by the Associate Solicitor for Public Lands, M-36454 (July 23, 1957), indicated that lands in valid existing grazing leases issued under the 1927 Act must be considered as appropriated and segregated, and not available for entry under the homestead and similar public land laws relating to vacant, unappropriated lands, unless and until such lands had been determined to be suitable for such purpose, and appropriate action to cancel the lease to the extent necessary had been taken. It suggested regulations be promulgated to this effect. This view, however, was not followed in the regulations for reindeer grazing.

> We have an anomalous situation before us because of these differing interpretations. The 1933 grazing lease issued under the 1927 Act, but it was made subject to "all rules and regulations which the Secretary of the Interior may prescribe." The Secretary did prescribe a rule in 1938 making the 1937 Act the governing law pertaining to reindeer grazing. To the extent, therefore, that the 1937 Act and regulations thereunder did not cut back rights of the lessee under the 1927 Act, they pertained to the existing reindeer lease.

Because the lessor could permit location and entry under any public land law of the leased lands, the lessee's rights would not be substantially lessened by an interpretation permitting settlement or occupancy on the lands under lease, where it did not disturb any improvements of the lessee, prior to cancellation of the lease or after. There may be reasons for distinguishing between circumstances where reindeer are grazed and the leases cover enormous areas of land for small bands of the reindeer, and where other livestock, which may have to be confined and which may not range over such a wide area, are to graze. The regulations suggest a difference in the segregative effect of such leases and permits under the two Acts. However, a reindeer permit should be canceled before a settlement claim is approved for patent as to any lands within such a permit.

The crucial question in this case is whether cancellation of the conflicting reindeer lease was required before any occupancy of the natives here could be recognized -- as distinguished from allowance of a native allotment application and approval for patent. We first point out that allowance of a native allotment application under the 1906 Native Allotment Act is discretionary with the Secretary of the Interior. If he considers the public interest in retaining public lands or devoting them to other uses to outweigh allowance of an allotment application, the application may be rejected on that ground by BLM with reasons showing the basis for the exercise of discretion. The Secretary, by regulation under the 1937 Reindeer Grazing Act, has permitted settlement rights to be recognized even if the permit, were it not for the regulation, might be considered to have some segregative effect under a rationale analogous to that in the Associate Solicitor's Opinion of July 23, 1957. Generally, rights to be gained under the public land laws where there is no discretion on the part of the Secretary, cannot be initiated if the land is segregated from such appropriation in any way. Here, however, the manifest strong policy of the 1937 Reindeer Act was to benefit natives and to help their economic status by strengthening and promoting the reindeer industry exclusively among natives. To allow natives to occupy land within such grazing leases so long as it did not interfere with the reindeer grazing was consistent with

that policy. Where such occupancy would create problems, the Secretary in his discretion could reject native allotment applications. He could not reject other settlement applications in that discretion unless the land was deemed to be segregated from the initiation of such rights.

[1] Although the grazing lease issued in 1933 was originally issued under the 1927 Act, it became subject to the 1937 Act and rules and regulations thereunder. Such rules, regulations and interpretations then of the effect of grazing rights granted under the 1937 Act upon native occupancy claims may be applied to such a lease, if they are not to the detriment of the lessee. We see no detriment in these circumstances. These considerations distinguish this case from the Schweite and Naughton decisions, supra, which only involved the 1927 Act and rules, regulations, and interpretations thereunder.

[2] The Secretary's regulation pertaining to reindeer grazing under the 1937 Act allows settlement rights to be initiated while a permit issued under that Act is in existence. When the natives in these three cases allegedly initiated occupancy of the land, there was no regulatory prohibition upon their occupancy of the land. Nothing in the 1937 Act, or the regulations thereunder affecting this lease, precluded such native occupancy before cancellation of the lease so long as no interference with the lessee's rights or improvements were involved. Therefore, we are persuaded that the policy manifest in the Secretary's subsequently-promulgated regulation pertaining to reindeer grazing may be followed, in the exercise of the Secretary's discretion, to permit consideration of a native's occupancy after the 1937 Act, even though the land was covered by a reindeer grazing lease issued prior to that time under the Act of March 4, 1927.

The BLM decision failed to consider the implications arising from the 1937 Act and its effect upon reindeer grazing leases. It rested solely upon the effect of the 1927 Act. Therefore, the decision will be set aside, and the cases remanded to BLM to determine whether the Secretary in his discretion should recognize the occupancy of the natives prior to the 1958 withdrawal and should allow their applications. This will entail consideration of the facts pertaining to the natives' applications and pertaining to the need and use for the land contemplated by the subsequent withdrawals.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case records are remanded for further consideration.

Joan B. Thompson
Administrative Judge

We concur:

Martin Ritvo
Administrative Judge

Douglas E. Henriques
Administrative Judge